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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 02 205 50174 Office: TEXAS SERVICE CENTER Date: AUG 04 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a new U.S. office operating as a wholesaler of saunas, pools, tanning beds, solariums and supplementary products. It seeks to employ the beneficiary as its general manager, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee. The director, reviewing the petition as if the petitioner was not a new office, concluded that the beneficiary would not be employed in the U.S. entity in a primarily managerial or executive capacity.

Counsel subsequently filed an appeal. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, counsel states that the director "misapplied the law," and specifically sections 101(44)(A) and (B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(44)(A), and Operating Instruction 214.2(a)(5), in her denial of the petition.[1] Counsel states that the petition should be reviewed in accordance with the factors outlined in the operating instructions for a new office. Counsel further claims that the director failed to consider evidence submitted in response to the request for evidence. Counsel submits a brief in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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[1] Counsel incorrectly cites the operating instructions. The appropriate cite for the operating instruction referred to by counsel is 214.2(l)(5)(i)(A)(5).

Moreover, pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The issue is whether the petitioning organization, as a new office, will, within one year of approval of the petition, support the beneficiary in a primarily managerial or executive position.[2]

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

(1) Manages the organization, or a department, subdivision, function, or component of the organization;

(2) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(3) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

[2] Pursuant to the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(F), the petitioner is deemed to be a new office. The record demonstrates that although incorporated in January 2000, the petitioning organization has not been doing business in the United States for more than one year.

(4) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

(1) Directs the management of the organization or a major component or function of the organization;

(2) Establishes the goals and policies of the organization, component, or function;

(3) Exercises wide latitude in discretionary decision-making; and

(4) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

On June 20, 2002, the petitioner filed a nonimmigrant visa petition to employ the beneficiary for one year as its general manager. In an accompanying letter, dated January 27, 2002, the petitioner stated that the beneficiary's job duties in the U.S. company would include managing and overseeing local acquisitions, sales, shipments of goods purchased via the Internet, and employment and training of sales personnel and office assistants, exercising discretionary decision making authority over projects, and making personnel recommendations pertaining to hiring and firing. The petitioner also explained that the beneficiary would be employed in a "function management position[,] which requires [the] management of essential functions within the company whose efficient management is indispensable to achieving [the petitioner's] organizational goals."

In a request for additional evidence, dated August 20, 2002, the director asked that the petitioner submit organizational charts for the foreign and U.S. entities, noting all positions in the companies, the names of the employees, and the duration of each employee's employment.

In a response submitted by facsimile on August 23, 2002, the petitioner stated that as president of the petitioning organization, the beneficiary would be responsible for supervising and managing the operations of the business, acquiring new customers, maintaining existing customer relationships, and overseeing all other activities, including sales, service, maintenance, and administrative matters. The petitioner submitted an organizational chart for the foreign and U.S. entities, in which the beneficiary was identified as the chief executive officer and president of both companies. The beneficiary's subordinates in the U.S. entity included a sales director and a sales agent.

In a decision dated January 8, 2003, the director stated that the record supports a finding that at the time of filing the petition the beneficiary was the sole employee of the petitioning organization. The director acknowledged the petitioner's claim in its response to the request for evidence that two additional employees had been hired, but stated that Citizenship and Immigration Services (CIS) must base its decision on the number of employees at the time of filing the petition. The director further stated that "[g]iven the limited size and scope of the business," the

beneficiary's proposed position cannot be considered to be primarily managerial or executive. The director concluded that the beneficiary would not be employed in the U.S. entity as a manager or executive, and denied the petition.

Counsel submits a lengthy brief on appeal. As counsel's brief is part of the record, it will not be entirely repeated herein. Specifically, counsel states that in denying the petition, the director failed to consider sections 101(44)(A) and (B) of the Act and Operating Instruction 214.2(l)(5)(i)(A)(5), which identifies factors to be considered for a petition involving the opening of a new office. Counsel asserts that "it is clear that many of the functions which [the beneficiary] would perform as President of the company would be managerial in character," and states that the beneficiary would manage activities of the petitioning organization by "calling upon his German staff and through independent contractors in the U.S. as well as with the [two] employed staff members." Counsel states that the director may not determine qualification as a manager or executive based on the scope or size of the organization alone, but must analyze other factors, such as the size of the U.S. investment, the products to be provided, the physical premises, and the viability of the foreign entity. Counsel refers to several unpublished AAO decisions as evidence that a beneficiary in a "small- or medium-sized business may establish initial operations in the United States with one person and still be classified as an executive or manager when they use independent contractors."

Counsel also claims on appeal that the director failed to comply with the regulation at 8 C.F.R. § 103.2(b)(8). Counsel denies the director's finding that the petitioner employed the beneficiary only at the time of filing the petition, and claims that the director's finding "is a violation of the appropriate legal standard . . . which mandates consideration of evidence submitted in response to the [request for evidence]." Counsel also submits additional documentation on appeal, including the petitioner's sales literature and business plan.

On review, the record does not demonstrate that within one year of approval of the petition the petitioning organization would support the beneficiary in a primarily managerial or executive capacity. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the scope, organizational structure, business plans, financial goals and size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

The record does not demonstrate that within one year of approval of the petition the organizational structure of the U.S. entity would be sufficient to support the beneficiary as a manager or executive. Although counsel claims on appeal employment of a sales director and sales agent, counsel failed to submit any evidence confirming the petitioner's employment of these two individuals at the time of filing the petition. Additionally, counsel merely asserts on appeal that the petitioner uses independent contractors for payroll and accounting, yet provides no documentation, such as contractual agreements and financial records, establishing such. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the director correctly concluded that at the time of

filing the petition, the record lacked sufficient evidence to establish the employment of subordinate employees. *See* 8 C.F.R. § 103.2(b)(12) (the regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed).

Even if the AAO were to accept counsel's claim that the petitioner employs a sales director and agent, there is insufficient evidence in the record to conclude that they would relieve the beneficiary from performing non-qualifying duties following the first year of operations. Neither the petitioner's response to the request for evidence nor counsel's brief on appeal describes the job duties to be performed by the petitioner's two employees. This evidence is necessary in order to determine whether the beneficiary would actually be supervising or directing the work of subordinates, or instead personally performing the functions of the business. This is particularly important with regard to the beneficiary's responsibility of overseeing the petitioner's service and maintenance functions, administrative matters, and personnel training, as these are not typical job duties that a sales director or agent would perform in place of the beneficiary. Therefore, absent additional evidence, it is reasonable to conclude that the petitioner's two employees would not relieve the beneficiary from performing non-qualifying functions. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Moreover, the record does not support counsel's claim on appeal that the business plan shows a "detailed analysis" of the growth of the petitioning organization. Counsel states that the beneficiary would manage the petitioner's activities by "calling upon his German staff and through independent contractors in the U.S. as well as with the [two] employed staff members," and refers to the business plan as proof of this growth. However, the business plan offers no additional explanation of a proposed organizational structure sufficient to relieve the beneficiary of performing non-managerial or non-executive job duties. In fact, the financial analysis in the business plan indicates salary expenses for the years 2003 and 2004 in the amount of $20,000 and $40,000, respectively.[3] It seems doubtful that the petitioner would be able to employ a sales director, sales agent, and an unknown number of independent contractors for $40,000. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Furthermore, there is no explanation either in the business plan or by counsel on appeal as to the functions the beneficiary's "German staff" would perform in the petitioning organization. Again, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

There is also insufficient evidence in the record to substantiate the petitioner's claim that the beneficiary would manage an essential function of the U.S. company. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Neither the petitioner nor counsel has provided the evidence necessary to establish that the beneficiary manages an essential function.

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[3] The AAO notes that these amounts do not include the $60,000 proposed salary of the beneficiary, which is reflected under the title of "management."

The record also fails to demonstrate that the financial status of the foreign and U.S. entities is sufficient to support the beneficiary in a primarily managerial or executive capacity within one year of approval of the petition. The petitioner's business plan indicates that following the first year of operations the petitioning organization would realize neither a gain nor a loss. However, as previously noted, the petitioner's analysis of its expenses includes a questionable estimate of annual salaries. Additionally, the petitioner did not include rent expenses in its analysis, which would amount to an additional $14,400 in expenses. Moreover, the foreign company's financial statements are not clearly translated into English, nor are the financial amounts depicted in U.S. dollars. *See* 8 C.F.R. § 103.2(b)(3). Therefore, the petitioner has failed to establish each organization's ability to financially support the beneficiary as a manager or executive within one year of approval of the petition.

Counsel correctly notes on appeal that the size of an organization alone is not a proper basis for denying the beneficiary classification as a manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* In the present matter, the record fails to establish the employment of subordinates who would perform the non-managerial or non-executive operations of the company, or document the financial abilities of the foreign and U.S. entities. These discrepancies, in conjunction with the size of the petitioning organization, support a finding that the beneficiary would not be employed in a primarily managerial or executive capacity within one year of approval of the petition.

Counsel also cites on appeal several unpublished AAO decisions as evidence that a beneficiary working as the sole employee of an organization that relies on independent contractors may be considered a manager or executive. Counsel, however, has furnished no evidence to establish that the facts of the instant petition are analogous to those in the AAO decisions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all Citizenship and Immigration Services (CIS) employees in the administration of the Act, unpublished decisions are not similarly binding.

Furthermore, counsel contends on appeal that the director failed to comply with the regulation at 8 C.F.R. § 103.2(b)(8), which counsel claims requires the director to consider evidence submitted in response to the request for evidence. There is no indication that the director failed to comply with the regulation at 8 C.F.R. § 103.2(b)(8). Rather, as correctly noted by the director in her decision, the director did not consider this evidence, which addressed the employment of two other individuals, because there was no indication that the individuals were employed at the time of filing the petition. The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. *Id.*

Finally, counsel addresses on appeal the standard of review for visa petitions. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan,* 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully

qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner has failed to meet this burden.

Based on the evidence provided, the AAO cannot conclude that within one year of approval of the petition the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity.

An additional issue not addressed by the director is whether the foreign and U.S. entities are qualifying organizations as required in the regulation at 8 C.F.R. § 214.2(l)(3)(i). The petitioner stated on the petition and in accompanying documentation that the petitioner and the beneficiary's foreign employer are affiliates, as they are owned and controlled by the same parent corporation, QLS Foundation. While the petitioner submitted a stock certificate reflecting ownership of the U.S. entity's stock by QLS Foundation, the petitioner failed to provide evidence confirming a parent-subsidiary relationship between QLS Foundation and the beneficiary's foreign employer. Therefore, the record lacks documentary evidence confirming an affiliate relationship between the petitioner and the beneficiary's foreign employer. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 193. For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.